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No. 94-1592

In the Supreme Court of the United States
OCTOBER TERM, 1994

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.,
PETITIONERS,

v.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, ET AL.,
RESPONDENTS.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONSE OF RAILROAD RESPONDENTS TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is time spent by a train crew, which has been relieved from train operating duties, waiting for deadhead transportation, time on duty within the meaning of the Hours of Service Act, 49 U.S.C. § 21103(b)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
ARGUMENT	6
I. The Seventh Circuit Decision Is Correct	6
II. No Serious Railroad Safety Issue Is Presented By This Case	7
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page(s)
Asarco v. EPA, 616 F.2d 1153 (9th Cir. 1980)	10
Atchison, T. & S. F. Ry. v. Peña, 44 F.3d 437 (7th Cir. 1994)	2, 7, 8, 10
Camp v. Pitts, 411 U.S. 138 (1973)	9
Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989)	9-10
Florida Power & Light Co. v. Lorion, 470 U.S. 729 (1985)	9
United Transp. Union v. Skinner, 975 F.2d 1421 (9th Cir. 1992)	4, 8
United States v. Stauffer Chemical Co., 464 U.S. 165 (1984)	7

Statutes **Page(s)**

45 U.S.C. §§ 59-66 (1988) 2

Hours of Service Act, Pub. L. No. 103-272, 108 Stat. 745, to be codified at 49 U.S.C. §§ 20102, 21101-08, 21303-04 2

49 U.S.C. § 21103(a) 2

49 U.S.C. § 21103(b) 3

Rules

Rules of the Supreme Court of the United States, Rule 29.1 2

Miscellaneous

Railroad Safety Authorization for Fiscal Year 1979: Hearings Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978) 3-4

Natalie Angier, *Cheating on Sleep: Modern Life Turns America into the Land of the Drowsy*, N.Y. Times, May 15, 1990, at C1, C8 10

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Respondents, The Atchison, Topeka and Santa Fe Railway Company, Burlington Northern Railroad Company, Consolidated Rail Corporation, CSX Transportation, Incorporated, Illinois Central Railroad Company, Norfolk Southern Railway Company, Norfolk and Western Railway Company, Southern Pacific Transportation Company, and

Union Pacific Railroad Company (hereafter "Railroads"),1/ which conduct about 90 percent of the nation's train operations, respectfully submit their views on the petition for a writ of certiorari and the supplemental brief in support of that petition filed by the Brotherhood of Locomotive Engineers and United Transportation Union (hereinafter "unions") to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Atchison, T. & S. F. Ry. v. Peña*, 44 F.3d 437 (7th Cir. 1994).2/

COUNTERSTATEMENT OF THE CASE

The Hours of Service Act ("HSA") regulates the maximum hours that a train crew can be continuously on duty. Originally 16 hours, the HSA currently specifies 12 hours as the statutory maximum. 49 U.S.C. § 21103(a).3/ Not all train crews are always or even regularly required to work the maximum hours allowed by law during a tour of duty. On those occasions that it appears a crew will be

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1/ The Railroads filed the list required by Rule 29.1 of the Supreme Court Rules in their Application for Extension of Time to File a Response to Petition for Writ of Certiorari filed on April 26, 1995.

2/ The Railroads agree with the petition's list of parties, except that the list incorrectly uses the word "Railroad" rather than "Railway" in the name of Respondent The Atchison, Topeka and Santa Fe Railway Company.

3/ At the time of the Ninth and Seventh Circuit decisions, the HSA was found at 45 U.S.C. §§ 59-66 (1988). Subsequently, Congress enacted legislation which will recodify the Hours of Service Act at 49 U.S.C. §§ 20102, 21101-08, and 21303-04 without substantive amendment. *See* Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 745.

unable to complete its assignment within the 12-hour maximum, a railroad instructs the crew to "tie-up" (*i.e.*, park) the train at a secure location before the crew reaches the 12-hour limit. The crew is thereafter relieved from any other train operating duties while it waits for transportation to return it to its reporting point (so-called "deadhead transportation"). J.A. at 88, 92-93, 95.

From the HSA's enactment in 1907 until the 1969 amendments to the HSA, this time spent waiting for deadhead transportation was not treated as time on duty to be counted toward the HSA maximum hours of service. After the 1969 amendments, the Federal Railroad Administration ("FRA"), which then assumed responsibility for the HSA, consistently treated this waiting time as neither time on duty or time off duty. *See* 49 U.S.C. § 21103(b). In other words, it was treated as "limbo" time. J.A. at 37.4/

Thus, Congress in the HSA accommodated two interests. Safety was addressed by limiting the consecutive hours a crew could be on duty. At the same time, by allowing railroads to utilize crews right up to the statutory maximum, Congress recognized that the vagaries of railroad operations required that railroads have flexibility in utilizing train crews.5/

4/ The Government Respondents refer to the Railroads' history of the HSA's application as "anecdotal." Federal Respondents' Brief at 4. This "anecdotal evidence was unrefuted and consisted of sworn statements of officials from the major railroads with personal knowledge of their railroad's historical operating practices and compliance with the HSA.

5/ For example, Congress refused rail labor's proposed amendment to the HSA which would have reduced the maximum hours of service below 12 hours. *See Railroad Safety Authorization for Fiscal Year 1979:*

In 1992, the Ninth Circuit suddenly altered this longstanding statutory scheme in *United Transp. Union v. Skinner*, 975 F.2d 1421 (9th Cir. 1992). Contrary to the unions' characterization, Pet. at 4, the Ninth Circuit did not hold "that the HSA was violated by requiring a crew to stay on a train awaiting deadhead transportation." Rather, the court held that the time spent waiting for deadhead transportation was to be counted as time on duty. 975 F.2d at 1426. The FRA then decided to apply this new interpretation of the HSA nationwide. To implement the Ninth Circuit's new interpretation of the HSA, the FRA issued several directives to the railroad industry. Under these directives, the time spent waiting for deadhead transportation counted as time on duty regardless of whether the crew waited on the train or at some other location. According to the FRA, the crew was deemed to be on duty, even though no longer performing duties or, indeed, no longer on the train, until the deadhead transportation vehicle, typically a crew van or taxi, arrived at the crew's location.

The Railroads did not thereafter file "several petitions" with the FRA, as the unions erroneously state. Pet. at 4. The Railroads filed one petition with the FRA on March 26, 1993 showing that there was no legal or factual basis for the FRA to adopt a new nationwide statutory interpretation based on the Ninth Circuit's holding. The Railroads' petition was supported by affidavits from officials of the Railroads, who were familiar with the historical treatment of this waiting time. They explained that waiting time had never been

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Hearings Before the Subcomm. on Transp. and Commerce of the House Comm. on Interstate and Foreign Commerce, 95th Cong., 2d Sess. 102-03, 166 (1978) (testimony of FRA Administrator and Chairman of the Railway Labor Executives' Ass'n).

treated as time on duty, either before or after the 1969 HSA amendments.

The Railroads also explained the severe practical problems that would follow from the FRA's nationwide acquiescence in the Ninth Circuit's re-interpretation of the HSA. Before the FRA's new statutory interpretation, railroads had a safe harbor within which they could utilize crews without violating the HSA. For more than 80 years, there was no violation as long as the crew was relieved from duty prior to reaching the maximum limit. Now railroads had to predict not only when a crew would reach the maximum HSA limit, but how much time would be needed to dispatch transportation to meet that crew before it reached the 12-hour limit. As a practical matter, railroads could no longer be assured of the ability to use crews up to the 12-hour limit when necessary to meet exigencies caused by weather and other scheduling delays. Railroads also had to build in time before a crew reached its limit in order to arrange transportation, often to remote locations, or risk violation of the HSA under the FRA's new interpretation. J.A. at 50-51.

The Railroads supplemented their FRA petition on May 19, 1993, after the FRA published a Federal Register Notice repeating its decision to apply the Ninth Circuit's HSA interpretation nationwide. Even though the Railroads' petition to the FRA had been filed two weeks before this Federal Register Notice, the FRA made no mention of it in the Notice. The Railroads' supplement also explained that they were incurring thousands of instances of excess service under the changed statutory interpretation despite their efforts to comply.

Even though the unions were served with the Railroads' petition and supplement, they opted not to participate in the

FRA's proceedings on the Railroads' petition to the FRA. They eventually intervened as parties in the Seventh Circuit proceedings and submitted briefs and participated in oral argument.

SUMMARY OF ARGUMENT

The unions are seeking certiorari on the bases of a split between the Seventh and Ninth Circuits and an alleged "serious railroad safety issue." The Railroads neither support nor oppose certiorari. The Railroads are filing this response pursuant to Rule 15 of the Court's Rules, because the unions' claimed serious safety issue is premised on numerous factual misstatements and improper extra-record materials and has no basis whatsoever.

ARGUMENT

I. The Seventh Circuit Decision Is Correct

The Seventh Circuit's unanimous en banc decision is clearly the correct interpretation of the HSA. Unlike the Ninth Circuit, the Seventh Circuit's decision is based on an analysis of the HSA's statutory language, purposes, and history. The Seventh Circuit's decision is also consistent with the 80-year practice of *not* counting time waiting for deadhead transportation by a relieved crew as time on duty under the HSA. In contrast, the Ninth Circuit's decision was based primarily on a misreading of inapposite cases under the HSA. The Ninth Circuit also had the disadvantage of not having before it a complete record of the historical treatment

of time waiting for deadhead transportation, first as time off duty and then, after the 1969 Amendments, as limbo time.

The FRA has indicated that it will apply the Seventh Circuit's interpretation of the HSA in all Circuits, except the Ninth. Pet. at 31a. The Railroads take no position on whether this Court should resolve the split in FRA's enforcement scheme at this time.6/

II. No Serious Railroad Safety Issue Is Presented By This Case

The Railroads object to the unions' claim that the Seventh Circuit's decision presents a serious safety issue requiring this Court's attention. The unions' safety arguments are improperly based on materials that are outside the record in

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6/ The four western railroads that were party to *Peña*, however, have appealed the FRA's decision to apply an interpretation of the HSA which is contrary to that adjudicated in *Peña* to their operations in the Ninth Circuit. On April 28, 1995, these railroads filed a petition for review in the Court of Appeals for the District of Columbia Circuit challenging this most recent FRA application of the HSA. Contrary to the unions' assertions in their supplemental brief in support of their petition for certiorari, the western railroads' petition does not ask the D.C. Circuit to review the same issue of interpretation as raised in *Peña*. Rather, the sole, narrow issue raised is whether the doctrine of mutual collateral estoppel precludes the FRA from reasserting against the western railroads an interpretation of waiting time which differs from that adjudicated against the FRA in *Peña*. Supp. Brief at 4a; *see United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984); *but see id.* at 178 (White, J., concurring).

this case and, in any event, that do not support their contention.7/

That the Seventh Circuit's interpretation of the HSA does not present a "serious railroad safety issue" is best illustrated by the fact that the FRA consistently applied this same statutory interpretation for more than 24 years prior to *United Transp. Union v. Skinner*. If the treatment of waiting time presented a safety issue, surely the FRA would have noticed it and brought it to Congress's attention during one of its numerous appearances at congressional hearings. In fact, the Government conceded in the en banc oral argument that it had no evidence or statistics that the amount of time spent waiting for deadhead transportation at the end of a crew's shift had ever contributed to a railroad accident. The lack of any evidence of a safety problem led the Seventh Circuit to admonish that the FRA "cannot now rely on post hoc rationalizations regarding safety to justify its abrupt decision to alter its interpretation." *Atchison, T. & S. F. Ry. v. Peña*, 44 F.3d 437, 442 (7th Cir. 1994) (en banc). The court further concluded that the FRA's statutory change "imposed a significant hardship on the railroads without contributing to railroad safety." *Id.* at 444.

The unions nonetheless argue to this Court that it was "common" for railroads to leave crews on trains for excessively long periods while waiting for deadhead transportation. The unions also contend that such crews still were on duty. Pet. at 5. The unions then join these claims

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7/ Nor is there a basis for the Government Respondents' suggestion that the Railroads are going to "cut corners," jeopardizing lives and property in order to beat the clock by speeding trains out of the Ninth Circuit. Federal Respondents' Brief at 11.

with the assertion that irregular work hours and sleep patterns create a safety hazard. As supposed evidence of the hazard to rail safety, the unions cite two newspaper articles and an assortment of articles on the sleep habits of employees with irregular or unpredictable shifts. Pet. at 6, 8-13. None of this so-called "evidence" was in the record below. As previously explained, the unions chose not to participate in the agency proceedings which led to this case. The only record evidence was that submitted by the Railroads. That uncontradicted evidence showed that the Railroads try to avoid or minimize waiting time for deadhead transportation and that, once relieved from duty, a train crew is not required to perform further train operating duties. J.A. 25-26, 27. Moreover, there is no dispute that, if a train crew is given train duties after reaching the 12-hour limit, the HSA is violated. The narrow legal issue presented by the Railroads' appeal was whether time waiting for deadhead transportation at the end of a crew's shift was time on duty when that crew had no such duties.

The unions' articles discussing safety were attached for the first time to their Seventh Circuit brief and, thus, were not part of the record below. The record before the Seventh Circuit consisted of the record developed in the agency proceedings on the Railroads' Petition to the FRA. The record before this Court is the same. The unions, having elected to wait and to participate as parties only at the appellate level, are required to take the record as it existed. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("'[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.'") (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *Esch v. Yeutter*,

876 F.2d 976, 991 (D.C. Cir. 1989); *Asarco v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).8/

Moreover, the miscellaneous newspaper and other anecdotal materials relied upon by the unions for an alleged safety issue in this case do not even relate to time waiting for deadhead transportation by a relieved train crew. For example, neither accident report on which the unions rely, Pet. at 10-12, recommends that waiting time be classified as time on duty. Another article, dealing with sleep disorders, makes no mention of the railroad industry, much less of any effect the classification of time spent waiting for deadhead transportation might have on rail safety. Natalie Angier, *Cheating on Sleep: Modern Life Turns America into the Land of the Drowsy*, N.Y. Times, May 15, 1990, at C1, C8.

The general thrust of the unions' extra-record materials is that irregular work cycles can contribute to fatigue. This issue is completely different from whether the time spent waiting by a train crew for transportation at the end of its shift must be counted as duty time for purposes of the HSA. The HSA does not regulate the time of day at which a crew can be called to duty, other than to mandate minimum rest periods between tours of duty.

The unions' safety argument really is a generalized policy argument properly addressed, if anywhere, to Congress, not the courts, as the Seventh Circuit recognized. *Peña*, 44 F.3d at 444 ("[T]he appropriate vehicle for changing the Act is further legislation. Congress has spoken its mind on this matter, and if it changes its mind, it can amend the Act.").

8/ These cases allow certain narrow exceptions to the general rule that review is limited to the administrative record, but none applies here.

CONCLUSION

The Railroads neither support nor oppose certiorari. However, to the extent this Court considers whether to grant certiorari in this case, that consideration should be based solely on the split in the circuits. This case does not present "a serious safety issue" requiring the Court's attention.

Respectfully submitted,

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